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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,
v.
HUMBERTO ALVAREZ-MACHAIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, THE INTERNATIONAL CHAMBER OF COMMERCE, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE BUSINESS ROUNDTABLE, THE AMERICAN PETROLEUM INSTITUTE, AND THE US-ASEAN BUSINESS COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Amici curiae The National Foreign Trade Council, USA* Engage, The Chamber of Commerce of the United States of America, The United States Council for International Business, The International Chamber of Commerce, The Organization for International Investment, The Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council respectfully submit this brief in support of Petitioner, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

Amici curiae and their members have a vital interest in the issues raised by petitioner. Over the past decade, scores of U.S. and international companies have been sued under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in cases stemming from their investments and operations outside of the United States. While some companies are alleged to have committed violations of the law of nations directly, more often plaintiffs have treated companies as surrogates for foreign governments—alleging that companies' overseas investments aided and abetted or otherwise facilitated human rights abuses by those governments. Not only do these lawsuits strain relations between the United States and the foreign governments who are the indirect targets of the litigation, they discourage foreign investment. Because of the importance of these issues to *amici*'s member companies, they seek leave to file this brief *amici curiae*, in order to assist the Court in its consideration of the issues in this case.

The National Foreign Trade Council (the "NFTC") is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies.

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their counsel, or their members made a monetary contribution to this brief.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local levels.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every region of the country. Chamber members transact business in all of the United States, as well as in large numbers of countries around the world.

The United States Council for International Business ("USCIB") is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the American affiliate of the International Chamber of Commerce and the International Organization of Employers.

The International Chamber of Commerce ("ICC") is the world business organization representing companies, chambers of commerce and business associations in 130 countries. Its mission is to promote multilateral trade among nations in the interest of global prosperity and peace.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States.

The Business Roundtable (the "Roundtable") is an association of CEOs of leading U.S. corporations with a combined workforce of more than 10 million U.S. employees. The Roundtable is committed to advocating public policies that ensure vigorous economic growth, a

dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness.

The American Petroleum Institute ("API") represents over 450 members involved in all aspects of the petroleum industry, including exploration, production, refining, and marketing. API members operate throughout the world as part of their commitment to meet America's energy needs.

The US-ASEAN Business Council is America's leading private business organization dedicated to promoting increased trade and investment between the United States and the member nations of the Association of Southeast Asian Nations.

In the aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and internationally, and, indirectly, much of the U.S. workforce. These same entities are also major players in the global economy, investing in and doing business with partners around the world. The *amici* are charged with representing the legal and policy interests of their members in matters of national import, and are regularly involved in litigation relating to international commerce and foreign policy issues. Such cases have included, for example, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), in which the NFTC brought suit with *amicus* support from the Chamber, OFII, and USCIB; *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), in which several of the groups filed *amicus* briefs; and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001), in which USCIB filed an *amicus* brief.

SUMMARY OF ARGUMENT

Petitioner Sosa and the United States make clear how the holdings below interfere with the United States'

counterterrorism and anti-crime efforts. This brief will focus instead on an issue of special importance to *amici*: how the erroneous interpretation and expansion of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), wreaks economic damage and undermines the nation's foreign policies.

The ATS, a single sentence in the middle of the Judiciary Act of 1789, was little-known and almost completely unused until 1980. Following the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980)—which some courts later interpreted as suggesting a private right of action in the ATS—the rate and scope of ATS litigation exploded. While the ATS is occasionally invoked against individuals or officials accused of violating international law—such as Petitioner Sosa—the vast majority of recent cases have targeted private companies with deep pockets. Foreign plaintiffs and the lawyers and organizations supporting them—often pursuing thinly disguised political agendas—have adopted the statute as a vehicle to embarrass foreign governments and to pressure businesses to abandon operations in targeted nations.

These lawsuits challenge foreign investment that is legal under U.S. law, and embarrass foreign governments the United States counts as friends and allies. ATS lawsuits almost invariably raise highly charged allegations of human rights abuses, generate considerable publicity, and involve enormous potential damages. The very existence of such lawsuits creates risk and poses a growing and significant obstacle to foreign investment by U.S. and multinational companies. ATS litigation is often specifically designed to disrupt the nation's foreign policy, interfering not only with the government's chosen policy on human rights, but also with its trade policy and foreign relations policy in general.

This onslaught of ATS suits has been prompted by a few courts' misinterpretation of the statute. Though Congress never intended the ATS to provide a private right of action,

the Ninth Circuit and other courts not only invented one, but then assigned to that cause of action standards derived from treaties and international agreements that the President and Congress have chosen not to adopt. As a consequence, the ATS has been transformed from its intended role as a jurisdictional provision applicable to a small class of cases into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealings with other nations.

These harms result not from Congress' design, but rather from judicial overreaching. This is judicial lawmaking in an area where the judiciary has neither expertise nor mandate. It strains the constitutional separation of powers and creates practical difficulties for the business community. *Amici* respectfully urge this Court to correct those errors and return the ATS to its proper, jurisdictional role.

ARGUMENT

I. ATS LITIGATION INCREASINGLY INTERFERES WITH FOREIGN INVESTMENT AND FOREIGN RELATIONS.

Litigation under the ATS threatens severe harm, both domestically and internationally, in ways the statute should be construed to avoid.

A. ATS Lawsuits Are A Serious And Growing Concern To U.S. And International Companies.

Over the past decade, scores of U.S. and multinational companies, including many of *amici*'s members, have been sued under the ATS. The suits allege a wide variety of international law violations, and concern conduct all over the world. The suits often have little or no connection to the United States, other than the presence of a defendant that does business (directly or through an affiliate) in this country. While some companies or their affiliates are alleged to have committed violations of the law of nations

directly, more often plaintiffs seek to hold private companies liable for the actions of foreign governments under theories of secondary or vicarious liability.

ATS lawsuits in recent years have included the following:

- A suit by residents of Peru against the U.S. subsidiary of a Mexican corporation for violations of their "'right to life,' 'right to health,' and right to 'sustainable development.'" *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 143 (2d Cir. 2003). The plaintiffs complained that the defendant's copper mining, refining, and smelting operations—operations regulated by and approved by the Peruvian Government—had caused environmental damage amounting to a violation of such international law rights as the "'right of the child to the enjoyment of the highest attainable standard of health.'" *Id.* at 165 (citation omitted).

- A suit against Coca-Cola seeking to hold the company liable for the death of a trade unionist shot by a paramilitary group on the grounds of a local bottling plant which the company neither owned nor managed. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

- A suit by Burmese villagers against a U.S. company whose foreign subsidiaries held a minority interest in a gas pipeline in Burma. *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb 14, 2003), *submission withdrawn pending decision in this case.* Plaintiffs seek to hold the company liable for "aiding and abetting" human rights abuses by the Burmese military in the vicinity of the pipeline.

- An Indonesian tribal chief's suit against several U.S. mining companies, alleging, among other things, environmental torts, genocide, and "cultural genocide" through interference with the tribe's "right to 'enjoy culture,' . . . right to 'freely pursue' culture, [and] . . . right to cultural development." *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167-68 (5th Cir. 1999).

This list is not exhaustive. ATS lawsuits against corporations have also involved claims challenging the clinical investigation of medications, the adequacy of financial disclosures, and the lease or purchase of properties expropriated by foreign governments.[2] They have extended to industries such as food products, transportation, banking, insurance, pharmaceuticals, chemical manufacturing, and technology.[3] And they have turned on conduct occurring in nations as diverse as Egypt, Nigeria, Papua New Guinea, and Sudan.[4]

Plaintiffs have even used the ATS to revive historical grievances that appeared to have been otherwise settled. One suit sought damages for the tragic 1984 Bhopal, India chemical accident—even though the defendant company had

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[2] *See, e.g., Abdullahi v. Pfizer*, 77 Fed. App. 48 (2d Cir. 2003) (clinical investigation); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (financial impropriety); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) (expropriation).

[3] *See, e.g., Villeda Aldana v. Fresh Del Monte*, No. 02cv3399 (FAM) (S.D. Fla., dismissed Dec. 12, 2003) (agriculture); *Digwamaje v. IBM Corp. et. al.*, No. 02cv6218 (JES) (S.D.N.Y. filed Aug. 2, 2002) (transportation, banking, chemical manufacturing, and technology).

[4] *Bigio v. Coca-Cola Co., supra* (Egypt); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Nigeria), *cert. denied*, 532 U.S. 941 (2001); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (Papua New Guinea); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Sudan).

already settled the claims with the Indian Government.[5] Other plaintiffs have sued companies—ranging from Ford Motor Company to the French national railroad company—for allegedly cooperating in human rights abuses by the Axis powers during World War II.[6] Numerous lawsuits currently consolidated for multidistrict proceedings in the Southern District of New York seek to hold dozens of U.S. and multinational corporations liable under the ATS for doing business in South Africa during the apartheid era.[7] Plaintiffs allege that the mere decision to do business in South Africa violated the law of nations by propping up the apartheid regime.

ATS lawsuits against companies invoke a bewildering variety of purported international law rights. Seeking to impose liability on private companies, plaintiffs (and a number of courts) rely on diverse sources to divine "customary international law," such as:

- Treaties never ratified by the United States, including the American Convention on Human Rights, the International Covenant on Economic Social and Cultural Rights, and the U.N. Convention on the Rights of the Child;[8]

[5] *See Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001).

[6] *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003).

[7] *See In re South African Apartheid Litig.*, MDL No. 1499 (JES) (S.D.N.Y.).

[8] American Convention on Human Rights ("American Convention"), Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Economic Social and Cultural Rights ("ICESCR"), opened for signature Dec. 19, 1966, 993 U.N.T.S. 3; United Nations Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess. Supp. No. 49, at 167, U.N. Doc. A/44/25 (1989), 1577 U.N.T.S. 3. *See, e.g., Flores*, 343 F.3d at 161 (ICESCR); *id.* at 164 (American Convention); *id.* at 165 (U.N. Convention on the Rights of the Child).

- Treaties ratified by the United States subject to an express declaration that the treaty is not self-executing, like the International Covenant on Civil and Political Rights;[9]
- Nonbinding United Nations General Assembly resolutions, like the World Charter for Nature and the Universal Declaration of Human Rights;[10]
- Non-treaty declarations, like the Rio Declaration on Environment and Development and the American Declaration of the Rights and Duties of Man;[11]
- *Ad hoc* tribunals, such as the International Criminal Tribunal for the Former Yugoslavia;[12]

[9] International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (ratified June 8, 1992). The Senate ratified the ICCPR subject to the United States' declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. S4781, S4784 (daily ed. Apr. 2, 1992). *See, e.g., Beanal*, 197 F.3d at 168 n.7 (discussing ICCPR).

[10] World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); Universal Declaration of Human Rights ("Universal Declaration"), G.A. Res. 217, U.N. Doc. A/810 (Dec. 10, 1948). *See, e.g., Flores*, 343 F.3d at 160-61 & 165 n.36 (World Charter for Nature); *Beanal*, 197 F.3d at 168 n.7 (Universal Declaration).

[11] Rio Declaration on Environment and Development ("Rio Declaration"), U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, U.N. Doc. A/CONF. 15 1/5 rev. 1 (1992); American Declaration of the Rights and Duties of Man ("American Declaration"), O.A.S. Res. XXX (1948). *See, e.g., Flores*, 343 F.3d at 169 (discussing American Declaration); *id.* at 161, 169 (discussing Rio Declaration); *Beanal*, 197 F.3d at 167 (same).

[12] *See, e.g., Unocal*, 2002 WL 31063976, at *12.

- The affidavits, books, and articles of "expert" scholars of international law;[13] and
- Strictly regional authorities with no connection to the United States, such as the European Court of Human Rights, and the Agreement Establishing the European Bank for Reconstruction and Development.[14]

B. ATS Lawsuits Harm The Economy By Putting Companies With A U.S. Presence At A Unique And Unfair Competitive Disadvantage.

The growing tide of ATS litigation challenging companies' investments and operations outside of the United States creates a unique but significant risk for companies with a U.S. presence. It is often difficult or impossible to join other parties, many of whom will not be subject to the jurisdiction of United States courts. This is particularly true with regard to foreign sovereigns whose acts are ultimately being challenged by many plaintiffs—but who are protected by sovereign immunity and the act of state doctrine.[15] Evidence necessary for the defense of ATS claims is often located abroad and may be inaccessible.[16]

In addition to the investment risk created by the mere existence of ATS litigation, companies face enormous uncertainty regarding the scope of potential claims under the

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[13] *See generally Flores*, 343 F.3d at 170.

[14] *See, e.g., id.* (European Court of Human Rights); *id.* at 172 n.43 (Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, 29 I.L.M. 1077).

[15] *See generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (sovereign immunity); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state doctrine).

[16] *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (noting inaccessibility of evidence implicating foreign government's role in alleged violations).

statute. Companies find it difficult or impossible to determine what acts may give rise to liability, because courts adjudicating ATS suits have drawn their notions of actionable conduct not only from binding treaties of the United States, but also from treaties the United States has not endorsed, nonbinding pronouncements by international organizations, decisions of *ad hoc* international tribunals, and from the varied and conflicting scholarship that makes up the field. *See generally Flores*, 343 F.3d at 158. Because ATS cases are based upon an implied cause of action without any clear standards of liability, there may be little companies can do to protect themselves against potential claims, short of simply ceasing to do business in the many nations whose human rights practices come up short against evolving Western ideals. Even companies that exercise care to behave responsibly themselves have no safeguard, because lawsuits have been maintained on evolving theories of secondary or vicarious liability for governmental acts. *See, e.g., Unocal*, 2002 WL 31063976, at *13-*17 (applying recently developed criminal aiding and abetting standards derived from *ad hoc* international criminal tribunals).[17]

These factors increase the risk, uncertainty, and cost of overseas operations and investment. The threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. The foreseeable result is less investment and trade with developing countries, and less international trade overall.

What is more, the economic downside of ATS litigation uniquely and adversely affects the *U.S.* economy. ATS cases

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[17] In addition, while corporate investment decisions are made for the long term, foreign governments (and their human rights practices) may change suddenly. This means that a company that had chosen to invest in a rights-respecting country may nevertheless find itself subject to ATS suits when the country's government unexpectedly changes.

are, as a practical matter, brought mostly against defendants with a presence in the United States. Those are the defendants over whom personal jurisdiction is most likely obtainable, and from whom judgments are most collectible. They are also, therefore, the entities who absorb ATS-suit related costs. Foreign companies without a U.S. presence, in contrast, need not fear ATS suits, and their associated costs. This means that U.S. companies (or companies with a U.S. presence) are at a significant competitive disadvantage against their foreign competitors—facing unique risks and uncertainty in the planning, financing, and insuring of activities abroad. They either have to absorb these added costs, or cede profitable ventures to other nations' companies.[18]

Already, "more than 50 [multinational corporations] are in the dock; and the damages claimed [in ATS lawsuits] exceeds $200 billion." Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Institute for International Economics, *Awakening Monster: The Alien Tort Statute of 1789*, at 7 (2003) (citation omitted). ATS litigation "could diminish U.S. merchandise trade (imports plus exports) by $50 billion to $60 billion with the target countries," putting "more than 100,000 U.S. manufacturing jobs at risk." *Id.* at 38-39.

Abusive ATS litigation ultimately deters investment by the very companies that are most likely to adhere to high standards of responsible conduct in their operations.[19] U.S. companies are among the most exemplary global corporate

[18] Foreign companies with a U.S. presence have, of course, a third option, equally harmful to the U.S. economy: they can downgrade their U.S. presence, shut down U.S. operations, and shift U.S. jobs overseas.

[19] *See, e.g.*, Letter from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Judge Louis F. Oberdorfer, July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C.) (predicting that foreign companies in Indonesia "would be far less concerned about human rights" than U.S. firms).

citizens, but they can be driven out of the countries that could most benefit from their example and the economic advantages their presence brings.

C. ATS Lawsuits Interfere With Foreign Policy.

Litigation under the ATS exacts a cost not only on this nation's economy, but also on its foreign policy. First, the judicially created cause of action under the ATS allows private plaintiffs to undercut the political branches' carefully chosen policies on human rights, trade, and national security. Second, private ATS lawsuits lead to significant friction with our allies and limit the President's flexibility in conducting foreign affairs. These negative implications of interpreting the ATS to provide a cause of action are severe enough to warn against such a construction.

1. ATS Lawsuits Interfere with Nuanced Policies of the President and Congress.

Although often brought in the name of human rights, ATS lawsuits can become a tool to hold companies liable for the very activities the President and Congress have allowed or even encouraged in the name of human rights. The promotion of human rights abroad is an important national goal—and one *amici* fully support. But wrongful interpretations of the ATS allow private litigants to substitute their own human rights agenda for that of the country's elected officials.

With few exceptions, United States policy is to *increase* international trade, investment, and economic cooperation as a central means of promoting human rights. *See, e.g.*, Remarks by President George W. Bush at Summit of the Americas Working Session (2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010423-9.html ("[O]pen trade reinforces the habit of liberty that sustains democracy over the long haul."); Remarks to the Council of the Americas by Peter F. Romero, Assistant

Secretary of State for Western Hemisphere Affairs (2001), *available at* http://usembassy.state.gov/japan/wwwhec0080.html ("Higher [economic] growth in Latin America is not just desirable but imperative for consolidating democracy. . . . To achieve that higher growth . . . no one has a more important role to play than you, the investor[.]").

Depending on the circumstances, the President and Congress employ multifaceted policies to promote human rights in different countries while safeguarding the United States' economic and foreign-policy interests. *See, e.g.*, Colin L. Powell, *The Promise of China Trade*, Wash. Post, June 1, 2001, at A31 ("Trade with China is not only good economic policy; it is good human rights policy and good national security policy."). In the rare cases when Congress and the President have determined that drastic action such as economic sanctions are warranted, they have set clear standards (either by statute or regulation), and concentrated discretion in the Executive to make exceptions when circumstances demand it. *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (imposing specific and limited trade sanctions on South Africa), *modified by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, 107 Stat. 1503 (1996) (providing for a partial repeal of the Comprehensive Anti-Apartheid Act, and possible total repeal upon presidential certification that an interim South African government has been elected on a nonracial basis). This represents a political judgment that the national interest is best served by making the process predictable and rational, lessening risk and uncertainty, and enabling quick responses to changing conditions.

ATS lawsuits are often thinly veiled attempts to undercut these careful political decisions. By way of example, the carefully "calibrated" federal sanctions on Burma this Court discussed in *Crosby v. National Foreign Trade Council*, 530

U.S. 363, 377 (2000), were designed to punish rights violations, reward improvement, protect previously made business decisions, and safeguard our national security. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009, 3009-121 (1996). Investment prohibitions were to apply to new investments only. This policy not only reflected a clear congressional judgment that the then-existing level of U.S. investment was *desirable* from a human rights standpoint,[20] but also protected prior investors' legitimate business expectations. The sanctions were selective—containing special exceptions for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. *Crosby*, 530 U.S. at 368. The sanctions were flexible—the President was empowered to lift sanctions when he found "measurable and substantial progress," and was instructed to add certain further sanctions if conditions deteriorated. *Id.* There was attention paid to developing a "multilateral" strategy together with other nations, *id.* at 369, and the federal sanctions act provided for periodic reports to keep Congress informed. *Id.* Finally, the act authorized the President to *waive*, "'temporarily or permanently'" any or all of the sanctions if he determined that to be in the "'national security interests of the United States.'" *Id.* (citation omitted).[21]

The ATS, which puts human rights policy in the hands of private plaintiffs, has been employed to undercut this

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[20] *See* 142 Cong. Rec. S8810 (daily ed. July 25, 1996) (statement of Sen. Breavy) ("Although the United States accounts for only ten percent of all foreign investment in Burma, allowing U.S. businesses to operate there will enable us to continue raising our concerns over human rights. I believe a U.S. voice in this process is critical if we are ever going to see real change in Burma.").

[21] This presidential waiver power was not just incidental; rather, it was a core part of the congressional scheme. *See Crosby*, 530 U.S. at 375 (mentioning the President's power as "most significant[ ]").

carefully crafted scheme. In one still-pending case, *Doe v. Unocal Corp.*, *supra*, Burmese villagers sought an injunction directing Unocal to cease its participation in an existing gas pipeline in Burma. Even though that very investment was permitted by the federal sanctions act—and lauded by members of Congress who voted for the act[22]—plaintiffs have invoked the ATS in an attempt to force the company's withdrawal. *Unocal*, 67 F. Supp. 2d at 1145.

Such litigation undercuts the carefully calibrated mix of blandishments and penalties the political branches use to achieve desired results in the international arena. Even where the policy of the United States is to encourage investment in developing nations as a means of promoting human rights, businesses will hesitate to invest because of the growing threat of ATS liability—making this nation's human rights policy all stick and no carrot.[23] The implied cause of action under the ATS places investors at risk of being sued for foreign governments' alleged abuses even if such investments were made with the permission, or the encouragement, of the U.S. government. In short, a judicially invented cause of action under the ATS allows those who have lost the political battle over sanctions to

[22] 142 Cong. Rec. S8809 (daily ed. July 25, 1996) (statement of co-sponsor Sen. Feinstein) (discussing the positive impacts arising in Burma from Unocal's investment there); *id.* at S8749-50 (statement of Sen. Johnston) ("I can tell you, Mr. President, that the President of Unocal—an American—it is better to have him in there than to have only the French because the French and the Europeans have never really helped on human rights matters. . . . When you have a country that has been so sealed off from Western influences, from civilizing influence, from moderating influences all these years, it is important to let the light in—the cleansing light of democracy, the cleansing light of Western civilization, the dynamic forces of the free market.").

[23] *Cf. Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2393 (2003) ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.").

achieve their ultimate goal—chilling investment in targeted countries—through judicial means.

2. ATS Lawsuits Undermine the President's Ability to Conduct Foreign Policy and Resolve International Disputes.

Private suits under the ATS "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 423 (1964).

First, ATS suits irritate our allies and threaten a range of U.S. programs dependent on international support. *See, e.g.*, Letter from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Judge Louis F. Oberdorfer, July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C.) (stating that Indonesia's negative reaction to an ATS lawsuit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform").

ATS suits can wreak havoc with vital foreign investment in nations struggling to recover from past misrule. Currently pending lawsuits against companies that did business in apartheid-era South Africa with the active encouragement of the United States and other governments, seek billions of dollars.[24] *See In re South African Apartheid Litigation*,

[24] The South African lawsuits belatedly challenge U.S. policy that *encouraged* U.S. business activity in South Africa (except for *specific* activities barred by statute) as a way of undermining apartheid through constructive engagement. In the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 203(b)(1), 100 Stat. 1086, 1096, Congress recognized and "applaud[ed]" American corporations whose codes of conduct aimed to aid South African non-whites in "gaining their rightful place in the South African economy."

MDL No. 1499 (JES) (S.D.N.Y.). Not surprisingly, the government of South Africa has strenuously objected to these lawsuits, which "disrupt [South Africa's] own efforts to achieve reconciliation and reconstruction," and undercut South Africa's deliberate decision to "avoid . . . apartheid trials and any ensuring litigation." Decl. of Pennuel Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa, July 11, 2003, at 2 & 8, filed in *In re South African Apartheid Litig.*, *supra.*

Reading a cause of action into the ATS also hamstrings the President's flexibility in conducting foreign policy—and especially his ability to negotiate an end to international conflicts that create human rights difficulties. By offending foreign governments and interfering with conflict resolution mechanisms, ATS suits may ultimately perpetuate and exacerbate human rights problems.[25] As this Court noted last year, concerns over civil liability can be a significant impediment to resolving conflicts. *See Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2389 (2003). In *Garamendi*, this Court struck down a California statute that conflicted with a presidential agreement designed to address private claims stemming from World War II-era Nazi deprivations. Noting the importance of the executive agreement at issue in that case, *Garamendi* emphasized the importance of settling financial claims, as part of ending conflicts. Assurances against financial liabilities may be a necessary *quid pro quo* for ending serious international conflicts. *See id.* at 2390 ("[C]laims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations.'") (citation omitted). And this need to settle war-related claims extends to public and private

[25] *See, e.g., Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1181 (C.D. Cal. 2002) (noting the State Department's position that "continued adjudication of this lawsuit 'would risk a potentially serious adverse impact'" on efforts to end a 10-year civil war).

liabilities alike: "[U]ntangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." *Id.* at 2387. The President's efforts to engage in diplomacy will inevitably suffer if foreign officials fear that they (or companies investing in their countries) can be sued under the ATS for past conduct.[26]

In sum, ATS lawsuits impose substantial economic costs and create significant conflicts with the nation's foreign policy—effects Congress surely could never have imagined, much less intended, when it enacted a jurisdictional provision 200 years ago. As the next part points out, these costs are directly traceable to the fundamental mistake, made by the Ninth Circuit and other courts, of reading a cause of action into a statutory provision that in fact creates nothing other than jurisdiction.

II. THE ATS PROVIDES FOR "JURISDICTION" ONLY AND CONTAINS NO PRIVATE CAUSE OF ACTION.

The ATS has no express cause of action. The statute, now codified at 28 U.S.C. § 1350 (2000), provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

On its face, the language does one thing and one thing only: it vests courts with jurisdiction over a certain class of cases—torts committed in violation of the law of nations or a

[26] *See, e.g., In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).

treaty of the United States. The statute does not explicitly go further to create a cause of action. Therefore any right to sue under the ATS does not come from the language of the statute. Instead, it either must be read into the statute as an implied right of action or must come from an extrastatutory source.

Reading the ATS to contain an implied cause of action is clearly wrong. There is a presumption against implied remedies. "'[A]ffirmative' evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy simply does not exist.'" *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) (citation omitted). Given the harmful consequences of ATS lawsuits detailed above, as well as the textual, historical, and constitutional concerns discussed below, there is simply no reason to infer a private cause of action in the ATS.

A. The Language, Structure, And Context Of The ATS All Make Clear That Congress Did Not Mean To Create A Cause of Action.

Throughout the nation's history, Congress has used language much like that in the ATS precisely to confer "jurisdiction." The Judiciary Act of 1789, of which the ATS is a part, "in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). In its original enactment in chapter 20, section 9 of the first Judiciary Act, the ATS appeared in the middle of a long list of other clearly jurisdictional provisions. It would be strange

to suppose that Congress had intended to imply a cause of action for the ATS alone out of all these provisions.[27]

This Court has held similarly worded statutes to confer jurisdiction only. For example, the Tucker Act provides that "[t]he . . . Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491. But that statute is "only a jurisdictional statute," which "does not create any substantive right," but rather confers jurisdiction over cases where the right involved has independently arisen. *United States v. Testan*, 424 U.S. 392, 398 (1976). Congress also used similar language in section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides that "[t]he district courts . . . shall have exclusive jurisdiction of violations of" the securities laws of the United States. Tasked with interpreting the scope of that language—nearly identical to the language used in the ATS—this Court was quite clear in holding that it merely "grants jurisdiction to the federal courts," but "creates no cause of action of its own force and effect." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979). Just as here, "[t]he source of plaintiffs' rights must be found, *if at all*," in a substantive provision of law, not in the jurisdictional statute. *Id.* (emphasis added). These cases confirm what should already be clear from the text: that the ATS' grant of jurisdiction does not by itself create a cause of action.

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[27] Congress' subsequent recodifications of the ATS reinforce this conclusion. After the original enactment in 1789, Congress three times recodified the ATS, each time placing the provision in the chapter addressing the jurisdiction of the district courts. *See* Rev. Stat. § 563, Sixteenth (2d ed. 1878) (part of ch. 3 ("District Courts—Jurisdiction")); Judicial Code of 1911, Pub. L. No. 61-475, § 24, Seventeenth, 36 Stat. 1087, 1093 (1911) (part of ch. 2 ("District Courts—Jurisdiction")); Title 28, Judiciary and Judicial Procedure, Pub. L. No. 80-773, § 1350, 62 Stat. 869, 934 (1948) (part of ch. 85 ("District Courts; Jurisdiction")).

The structure of the ATS also suggests it contains no private cause of action. The ATS applies equally to suits arising from violations of "the law of nations" and suits arising from violations of "treat[ies] of the United States." 28 U.S.C. § 1350. The two types of violations are in statutory parity. Thus, if the ATS supplies an independent right of action for violations of the law of nations, it must also supply an independent right of action for "violations of . . . a treaty of the United States." *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 820 (D.C. Cir. 1984) (Bork, J., concurring). But this cannot be. Such a reading would make all U.S. treaties self-executing—a result incompatible with settled law. *See id.* (the conclusion that the ATS supplies an independent right of action for treaty violations "stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in this little-noticed statute").[28] Indeed, such a reading of the ATS would not only abrogate the well-established rule that treaties are not self-executing, but would abrogate the rule in a particularly bizarre and unfair manner—making all treaties self-executing, but only for the benefit of *alien* plaintiffs. *See Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir.) (Randolph, J., concurring) ("To hold that the Alien Tort Act creates a cause of action for treaty violations . . . would be to grant aliens greater rights in the nation's courts than American citizens."), *cert. granted*, 124 S. Ct. 534 (2003).

In short, the ATS' language, structure and context make clear that Congress did not intend it to create a cause of action.

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[28] *See United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) ("[T]reaties do not generally create rights that are privately enforceable in the federal courts.").

B. The Ninth Circuit's Interpretation Of The ATS Gives Rise To Grave Constitutional Questions.

Even if there were any ambiguity in the statute's language, structure, and context, it would still not be proper to find a cause of action in the statute because of the serious constitutional infirmities that would result. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (statutes should be construed to avoid raising serious constitutional questions where such a construction is fairly possible).

Under the Constitution, it is not for the courts to define violations of the law of nations. Rather, the Constitution explicitly assigns that power to Congress. *See* U.S. Const. art. I, § 8, cl.10, (giving Congress the power "to define and punish . . . Offenses against the Law of Nations"). Such explicit constitutional assignments of power to the three distinct branches of government are not aspirational. Rather, as the fundamental means by which the Constitution attempts to ensure proper balancing to achieve a democratic government, textual powers assigned to a particular branch may not be shifted from one branch to the other. *See Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998). Where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define" "just how [governmental] powers are to be exercised," the constitutional procedures must be followed with precision. *INS v. Chadha*, 462 U.S. 919, 945 (1983). Thus, Congress may not delegate to the Judiciary its textually assigned power to "define and punish . . . Offenses against the Law of Nations," and the statute should be interpreted to avoid such an unconstitutional construction.

Similarly, the power to "make Treaties" is explicitly given to the President, "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. To take the substance of the ATS action from treaties that the President has not signed and the Senate has not ratified would be an unconstitutional circumvention of the Article II plan.

Cf. Chadha; *New York*. Hence, it is wrong to read the ATS as conferring binding status on treaties that the President has not signed, or the Senate has not ratified. And it is likewise error for U.S. courts to use the ATS as a mechanism of implementing the human rights standards of, for instance, the European Convention and the African Charter, as the Ninth Circuit did here. Pet. App. 30 n.18. The President and Senate did not and could not delegate their treaty power to these international organizations. "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring).

Reading a cause of action into the ATS results in troubling Article III implications as well. Some ATS suits (including this one) feature aliens suing aliens—making the suits ineligible for federal diversity jurisdiction. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983). For the suits to be maintainable, therefore, they would have to fall under another head of Article III jurisdiction—probably jurisdiction for "Cases . . . arising under . . . the Laws of the United States." U.S. Const. art. III, § 2, cl. 1. But, for reasons more fully explained in the Brief of Washington Legal Foundation, et. al. as *Amici Curiae*, at 14-19, international law itself, without some congressional action incorporating it into positive domestic law, is *not* law of the United States for Article III purposes. *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 596-619 (2002). Reading the ATS as permitting suits based only on generalized international law, with no further *specification* by statute or treaty, would mean the

statute attempted to provide jurisdiction well beyond the Article III limits.[29]

Given the seriousness of these constitutional issues, it would be especially misguided to read a cause of action into the ATS.[30]

III. THE ATS CONFERS JURISDICTION ONLY WHERE CONGRESS HAS PROVIDED A CAUSE OF ACTION BY STATUTE OR TREATY.

That the ATS does not create a cause of action does not mean that the statute is without effect. Rather, it means that the ATS becomes relevant whenever Congress has separately provided a cause of action, by a properly ratified treaty or a properly enacted statute. What the ATS does not comprehend, on the other hand, are the sorts of claims made by the plaintiff in this case, and the plaintiffs in most other ATS cases—claims based on alleged violations of *general* international law never codified by a statute or treaty of the United States.[31]

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[29] This does not mean, however, that the district court lacked Article III jurisdiction in this case. The lower court properly had *supplemental* jurisdiction to hear the claims against Sosa, based on its jurisdiction to hear the closely related claims against the United States and its officers. *See* 28 U.S.C. § 1367.

[30] Finally, international relations are primarily the concern of the political branches. To put the courts in charge of applying vague international law standards is to put the courts in a position where they will inevitably conflict with the political branches. It is this possibility of inter-branch friction that has led some judges to declare lawsuits under the ATS to be nonjusticiable political questions. *See Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring); *Alvarez-Machain*, Pet. App. 108 (Gould, J., dissenting). Even if the statute is justiciable, the Court should not extend its reach so as to maximize separation of powers concerns—which is what happens when plaintiffs sue corporations under the ATS for investments that the political branches approved of.

[31] The modern, individual-rights conception of international law was unknown to the founders. At the time the ATS was originally enacted,

When Congress wants to expand the class of cases for ATS jurisdiction, the way to do that is by enacting a cause of action, creating the substantive claims over which the general jurisdiction will rest.

Indeed, the Congress that passed the ATS would have been aware of provisions in at least four already-ratified treaties providing individuals wrongly injured by privateers such causes of action. For instance, the 1785 Treaty of Amity and Commerce between the United States and Prussia was designed in part to protect each nation's ships from the other nation's privateers. *See* Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. 15, 8 Bevans 78, 83. The Treaty created a right for individuals injured in violation of its terms to receive compensation for damages from the person committing the tort:

> [A]ll persons belonging to any vessel of war, public or private, who shall molest or injure in any manner whatever the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest . . . .

Id. Similar language creating a private right of action was present in the 1782 Treaty of Amity and Commerce with the Netherlands,[32] the 1778 Treaty of Amity and Commerce with France,[33] and the 1783 Treaty of Amity and Commerce with

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the "law of nations" vested rights *not* in individuals, but in nations. *See Banco Nacional*, 376 U.S. at 422-23.

[32] Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Netherlands, art. 13, 10 Bevans 6, 11 ("[I]f they act to the contrary, they shall be, upon the first complaint, which shall be made of it, being found guilty, after a just examination, punished by their proper Judges, and, moreover, obliged to make satisfaction for all damages and Interests thereof, by reparation, under pain and obligation of their Persons and Goods.").

[33] Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-France, art. 17, 7 Bevans 763, 769 ("[I]f they act to the contrary, they shall be punished and shall moreover be bound to make Satisfaction for all Matter

Sweden.[34] *See generally* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 470 (1995). In enacting the ATS, the First Congress knew that the statute would provide jurisdiction in the newly created federal courts for cases arising from these treaty provisions—as well as from any other self-executing, private-right-creating treaties that might be ratified later under Article II.[35]

More recently, Congress has shown its ability to provide an express *statutory* cause of action within the jurisdiction of the ATS by enacting the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. Unlike the ATS, the TVPA *explicitly* gives aliens and citizens alike a right to sue. *See id.* § 2(a) (stating that a torturer "shall, in a civil action, be liable for damages to [the victim]"). The TVPA addresses a specific, and specifically defined rights violation. *See id.* § 3 (defining torture and extrajudicial killing). The statute contains an exhaustion requirement, making U.S. courts a last resort, rather than a first one. *Id.* § 2(b) ("A court shall

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of Damage, and the Interest thereof, by reparation, under the Pain and obligation of their Person and Goods.")

[34] Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Sweden, art. 15, 11 Bevans 710, 716. ("[I]f they act to the contrary, having been found guilty on examination by their proper judges, they shall be bound to make satisfaction for all damages and the interest thereof, and to make them good under pain and obligation of their persons and goods.")

[35] Note that, at the time of its enactment, it was necessary to add the ATS for there to be jurisdiction over many of these claims. Today, jurisdiction over such claims would lie under the general federal question statute, 28 U.S.C. § 1331. But there was no such general federal question statute until 1875. *See* 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3561 (2d ed. 1984). Because the 1789 Judiciary Act did not contain general federal question jurisdiction, and because diversity jurisdiction in suits between an alien and a citizen then required a relatively steep ($500) amount in controversy, the ATS was necessary to provide jurisdiction over suits by an alien against a U.S. citizen, where the amount in controversy was less than $500.

decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). And the TVPA contains an explicit statute of limitations that represents Congress' judgment on how to balance victims' right to redress against interests of finality. *Id.* § 2(c) (10-year statute of limitations). The specificity and clarity of the TVPA stand in stark contrast to the vague implied cause of action some claim for the ATS.

Indeed, the very existence of the TVPA shows that the ATS should not be read as creating a cause of action itself. If the ATS provided a private cause of action for violations of the law of nations then Congress would have had no reason to enact the TVPA as it did, since many of its provisions would be rendered unnecessary and redundant. *See FCC v. Nextwave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003) (courts should reject interpretations that render parts of a statute superfluous). The ATS should be interpreted as conferring jurisdiction only, with any cause of action provided by the later statute.[36]

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[36] Needless to say, the legislative history of the TVPA cannot be read to expand the reach of the earlier enacted ATS. "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) (finding a later Congress' committee report of no consequence in determining the existence of an aiding and abetting cause of action under the securities laws); *see also Pierce v. Underwood*, 487 U.S. 552, 566 (1988) (rejecting committee report's view of a previously enacted statute's proper interpretation, because "it is the function of the courts and not the Legislature . . . to say what an enacted statute means"). If Congress wants to clarify previously enacted provisions and thereby create new law, it must do so not by writing committee reports, but rather through the constitutionally authorized mechanism of bicameralism and presentment. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 601 n.4 (1985); *Chadha*, 462 U.S. at 954.

That Congress can and does expressly create causes of action by treaties and by statutes like the TVPA counsels against reading the statute to contain a cause of action defined by the plethora of other, non-congressionally-sanctioned sources that courts like the Ninth Circuit have all too often relied on. If Congress has chosen not to provide a substantive cause of action, the void cannot be filled in by the "policy-driven or theoretical work of advocates that comprises a substantial amount of contemporary international law scholarship." *Flores*, 343 F.3d at 171. Nor can the nonbinding declarations of the United Nations General Assembly provide what Congress has not chosen to provide. *Id.* at 165. And finally, courts cannot derive the substantive law for human rights actions from treaties that the United States has chosen not to ratify, or that the United States considers non-self-executing. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). Actions under the ATS must be based on the duly ratified treaties and duly enacted statutes of Congress. By this means alone can companies make informed investment decisions in harmony with the foreign policy goals of the United States.

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Over the past decade, plaintiffs have relied on the ATS to make up for the political branches' perceived shortcomings in promoting human rights abroad. But the "decision about the right degree of pressure to employ," *Crosby*, 530 U.S. at 380, is a delicate one. Human rights victims and their supporters are better advised to direct their attentions to the political branches directly, rather than twisting a 200-year-old statute beyond its rational limits. When, where, and how best to promote human rights is, after all, a political decision that must take into account a wide variety of often competing goals and interests. *Cf. Banco Nacional*, 376 U.S. at 436 ("If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of

the national interest which the Judiciary would be ill-advised to undermine indirectly.").

Recent events point out how troubling is the conclusion that Congress authorized any cause of action by the ATS. The existence of these lawsuits is an increasing irritant in our affairs with other nations. They conflict with and undermine other recent congressional and presidential policies. And they put U.S. companies, and multinationals with a U.S. presence, at a unique competitive disadvantage in the international marketplace. To believe that Congress created anything more than a jurisdictional grant when it included the ATS in the first Judiciary Act strains credulity. *Amici* respectfully urge this Court to restore the ATS to its proper place.

CONCLUSION

For the reasons given above, the decision of the Ninth Circuit should be reversed.

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